NO. 22535 & 22535-A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ECONO-CAR INTERNATIONAL, INC.,

Appellant,

vs.

CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellee.

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CARL M. TAUTE, d/b/a ECONO-CAR OF BILLINGS,

Appellant,

vs.

ECONO-CAR INTERNATIONAL, INC.,

Appellee.

Appeal from the United States District Court
for the District of Montana, Billings Division

BRIEF OF APPELLANT ECONO-CAR INTERNATIONAL, INC. IN REPLY TO ANSWERING BRIEF OF APPELLEE CARL M. TAUTE

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Filed _____, 1968

_____, Clerk

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A. Admissibility of Oral Representations on Plaintiff's Fraud Claim

We will summarize the applicable principles of law as well as reply to Taute's argument with respect to the question of the admissibility of the oral representations on the fraud claim.

The alleged oral representations were inadmissible under the following rules:

1. The execution of a contract in writing supersedes all oral negotiations concerning its subject matter which preceded or accompanied the execution of the contract. R.C.M. 1947, § 13-607.
2. When the terms of an agreement have been reduced to writing, it is to be considered as containing all those terms and therefore there can be no evidence of the terms of the agreement other than the contents of the writing. R.C.M. 1947, § 93-401-13.
3. False oral promises or representations alleged to have induced a party to enter into a contract are not admissible if they relate to matters contained in the agreement. Kelly v. Ellis, 39 Mont. 597, 104 Pac. 873 (1909); Armington v. Stelle, 27 Mont. 13, 69 Pac. 115 (1902); Continental

Oil Co. v. Bell, 94 Mont. 123, 21 P.2d 65 (1933).

4. The parol evidence rule prohibits the reception of oral promises or agreements made prior to or contemporaneously with the execution of a written contract, which contradict, change, add to, or subtract from the express terms of the contract. This rule is applicable to oral negotiations which vary the legal construction and import of a written contract, although they may not contradict its express terms. Riddell v. Peck-Williamson Heating & Vent. Co., 27 Mont. 44, 69 Pac. 241 (1902).

5. The test as to when parol evidence varies, adds to, or contradicts a written contract is whether the "particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element." Hosch v. Howe, 92 Mont. 405, 16 P.2d 699 (1932), quoting Professor Wigmore.

We submit that the alleged oral representations here fall squarely within the purview of the above rules and are inadmis-

sible for any purpose.

Taute contends that the oral representations are admissible to explain indefinite, vague or ambiguous provisions of the agreement. In response to this assertion, we wish to point out that the language of the contract is not ambiguous. Even as to the much maligned word "guidance", the meaning of which is rather obvious and well known, the contract goes to considerable length to spell out what would be done in the nature of "guidance". If this contract needs explaining in the manner contended for, then any and all contracts need and could be legally explained, varied and added to by oral or extrinsic evidence. Additionally, even assuming for the purposes of argument that certain provisions of the contract are ambiguous, the alleged oral representations go beyond their function and serve to add to, vary and alter the express terms of the contract. For example, how could one possible read into the language of the contract or offer as an explanation of the language of the contract, a promise by Econo-Car to spend "every cent" of the $6,000.00 franchise fee in getting the operation going? Or, how can it be said that the alleged promise to run three full page newspaper ads does not add to the provision in the agreement that "ECONO-CAR places and runs at its own expense ads in the ECONO-DEALERS' newspaper to prepare the area for the new ECONO-DEALER"? It is significant to recall that Taute is not contending in this connection that the contract as written was not performed, but only that what Taute said that Burko said before the contract was signed was not performed.

Taute cites four Montana cases to support his position that the alleged oral misrepresentations were admissible. It is not possible to reconcile in all respects the cases cited by Taute with the overwhelming number of Montana cases excluding evidence of oral representations or oral promises under circumstances similar or analogous to the instant case discussed on pages 25 to 29 and 45 to 48 of Econo-Car's opening brief. It is possible, however, to show how even the four cases cited by Taute do not support his position here. Taute's four cases are:

Hillman v. Luzon Cafe Co., 49 Mont. 180, 142 Pac. 641 (1914);

Koch v. Rhodes, 57 Mont. 447, 188 Pac. 933 (1920);

New Home Sewing Machine Co. v. Songer, 91 Mont. 127, 7 P.2d 238;

McNussen v. Graybeal, 146 Mont. 173, 405 P.2d 447 (1965).

Only two of these cases involve claims of fraud, Hillman v. Luzon and Koch v. Rhodes. These are cases in which the alleged misrepresentations made were not only statements of existing facts (as opposed to promises as to the future performance of a party to the contract), but also were in the nature of guarantees, warranties or affirmative representations as to the quality of the subject of contracts for sale. In Koch v. Rhodes, 188 Pac. 933, supra, the representations were (1) that the real estate involved in the sales transaction contained 158 acres, instead of 117 acres as subsequently was discovered, (2) that timber claims across the river contained 80 acres of bottom land and good pasturage, whereas it was actually a mountainside

covered with slide rock with little or no bottom land or pasturage, and (3) that the vendor had cut over 200 tons of hay each year in the past which turned out to be a falsity. In Hillman v. Luzon, 142 Pac. 641, supra, the item being sold was a gasoline lighting machine and the oral representation admitted was that the machine was capable of running all night without being refilled, which was false.

These false representations of existing facts, in the nature of guarantees or warranties, present quite a different issue than here in Taute v. Econo-Car where the principal alleged misrepresentations being complained of are promises of performance in the future above and beyond those contained in the agreement itself.

Plaintiff's case McNussen v. Graybeal, 405 P.2d 447, supra, was strictly breach of contract case in which parol evidence was admitted to explain an ambiguous term which was not explained in the contract and which required extrinsic evidence to determine the true meaning. The court determined that the words "all milk" in the contract were ambiguous in that it could not be determined whether they meant that the defendant milk processor was required to buy all milk produced by plaintiff dairy producers (an output contract) or whether it meant that a specified price was to be paid for all milk required by defendant milk processor (a requirement contract). The court held that to determine this question it would be necessary to take evidence of all of the circumstances surrounding and preceding the signing of the contract. In New Home Sewing Machine Co. v. Songer, 7 P.2d 238, supra, the term "Finance Plan" was

held to be ambiguous because of one of a party's contention that it was a trade name used by the vendor meaning that the vendor would send representatives to sell machines at retail and give 7 lessons to each retail purchaser thereof. This case too, of course, was strictly a breach of contract case and the court admitted the evidence on the grounds that extrinsic evidence was required to explain what the parties understood the term to mean, but particularly emphasizing that it was obvious that the contract did not contain all of the terms of that particular contract.

In Hillman v. Luzon, 142 Pac. 641, supra, in addition to the representations being statements of existing facts in the nature of warranties or guarantees, the contract also had an ambiguity. The contract provided that the seller guaranteed that the machine was capable of doing first class work "up to claims". Nowhere in the contract was any explanation made of what the claims were. As a part of its reason for admitting parol evidence the court pointed out that parol evidence was necessary to explain the meaning of the phrase "up to claims" without which explanation the phrase would be meaningless. This case has an additional interesting aspect with respect to Econo-Car's position here for the court also held that it was reversable error to admit parol evidence that the vendor had represented that the lighting plant was capable of furnishing the light required by the vendee at an operating cost of not to exceed $35.00 per month, whereas the actual cost of its operation was double that amount. The court stated:

> "The contract contains no such warranty and the pleadings allege no such representation. The only suggestion of any such thing is the averment of a representation that the plant 'could be run at a given expense for a given length of time', but this is obviously inadequate to raise any issue." 49 Mont. at 185.

Thus the court in Hillman v. Luzon Cafe Co., 142 Pac. 641, supra, clearly acknowledged the necessity in a fraud case of pleading and proving all elements of fraud. We again point out to the court that probably the most important alleged fraudulent oral misrepresentation in the instant case was that "every cent" of the $6,000.00 franchise fee would be spent in getting the operation going, and that this alleged misrepresentation had not been pleaded or referred to in any of Taute's pre-trial statements of position.

B. Failure of Proof of Necessary Elements of Fraud

Taute has failed to indicate where in the record there is any evidence to prove that the alleged oral promises, if admissible, were made with no intention of performing them. This is a most essential element of plaintiff's fraud claim. At most, Taute's evidence can be taken to show that oral promises were made. But proof that a promise is made and then not carried out is no proof that it was made with no intention to perform. Reilly v. Maw, 146 Mont. 145, 405 P.2d 440 (1965). Nor can fraud be presumed. Rather, good faith is presumed and fraud must be proved. Cuckovich v. Buckovich, 82 Mont. 1, 264 Pac. 930 (1928).

Taute further failed to indicate where in the record

there is any evidence that plaintiff relied upon the statements alleged to have been made. In fact, Taute's actions, including his proceeding under the contract, his statements that he had no one to blame but himself and his letters showed his utter lack of reliance on the alleged representations.

Plaintiff's claim for fraud should fail for these reasons alone.

C. Waiver of Fraud

Taute's counsel has failed to perceive, or has ignored, the thrust of defendant's argument that Taute waived any right he may have had to sue for damages for fraud, saying only that Taute waived his right to rescind, but not his right to sue for damages for fraud. Under the facts of this case Taute waived, as a matter of law, not only his right to rescind, but also his right to recover damages for fraud.

It is undisputed that Taute knew of the falsity of the oral representations nearly two months before he either commenced operations or quit his prior job. At that time the agreement was almost wholly executory and could have been rescinded without trauma to either party. Instead, Taute, with full knowledge, deliberately elected to go ahead and take his chances. At a time when he could easily have rescinded, he elected to proceed under the contract as written, and, we believe at the same time under the circumstances here, waived his right to recover any damages for fraud.

As stated in the very case most heavily relied upon by Taute, a party to an executory contract procured by fraud

"may, after discovering the fraud, either perform it or rescind it; and if, with knowledge of the fraud, he elects to perform it, this is equivalent to his making a new contract, and to permit him under those circumstances to recover for fraud would be to do violence to every rule upon which compensatory damages are allowed." Koch v. Rhodes, 57 Mont. 447, 188 Pac. 933, 937, 938 (1920). When Taute, with knowledge that the alleged oral promises would not be performed, went ahead and performed the contract, he in effect made a "new" contract under the rule in Koch v. Rhodes, supra, and was then barred from recovery under the "old" contract. (Ironically, the "new" contract was the "old" contract as written, unmodified by the alleged oral promises.) And in Ott v. Pace, 43 Mont. 82, 115 Pac. 37 (1911) the court said that "the substitution of the new contract for the old amounted to a waiver of the fraud which entered into the execution of the old one." (115 Pac. at p. 39).

Taute did other things which showed that when he elected to go ahead he was affirming the contract as it was then understood (as well as originally written) and waiving the right to damages for fraud in the inducement under the above rule. For example, he signed Exhibit 7, he accepted changes in rates, he agreed to advertising changes, he asked for assistance and favors, all of which are inconsistent with his retaining the right to sue for fraud in the inducement. "(W)hen a party claiming to have been defrauded, enters, after discovery of the fraud, into new arrangements or engagements concerning the subject matter of the contract to which the fraud applies, he is deemed to have waived any claim for

damages on account of the fraud. . . . 'If, after his knowledge of what he claims to have been the fraud, he elects not to rescind, but to adopt the contract and sue for damages. . . he must not ask favors of the other party, or offer to perform the contract on conditions which he has no right to exact, and must not make any new agreement or engagement respecting it; otherwise he waives the alleged fraud.'" Schied v. Bodinson Mfg. Co. Cal.App. 1947, 179 P.2d 380, 385.

Taute waived any fraud.

D. Cost of Insurance

In Taute's answering brief, page 23, the statement is made that "when Chrysler Leasing reduced its rates to Econo-Car, Econo-Car in turn passed that reduction onto Taute." There is absolutely no basis in the record, or anywhere else as far as we know, for this statement that Chrysler Leasing reduced its rates to Econo-Car. This issue has arisen because of the court's instruction to the jury that unless they concluded that Taute agreed to the increase, the increase of $5.00 per month per car for insurance cost, commencing January 1, 1964, was a breach of the franchise agreement and that Taute should be compensated therefor. To summarize again this aspect of the case, Taute was required to make one payment per month per car to Econo-Car which payment covered the cost to Econo-Car of the insurance Coverage, the rent of the automobile itself, and presumably Econo-Car's overhead and administrative expenses. Taking a typical transaction, a Valiant under the original rate schedule cost Taute $129.00 per month. Econo-Car reduced this rate to $118.00 per month as of December 1, 1963, and increased

it to $123.00 per month as of January 1, 1964, the increase being required by the increase in liability insurance premiums which Econo-Car was required to make. Both before and after these rate changes, Taute made only one payment per month to Econo-Car, which payment included all of the charges for his use of the automobiles, including the insurance. It is extremely difficult to see how Econo-Car could be said to have breached the franchise agreement with respect to these rates when at a point two and one-half months after Taute's grand opening Taute was having to pay Econo-Car $6.00 per month less per car than he had originally agreed to pay. That the Court's conclusion that this as a matter of law was a breach of the contract is patently erroneous.

SUMMARY

As a summary of argument on all points, we are setting forth the language of the major headings of Appellant Econo-Car's opening brief argument with the page numbers where each topic may be found therein.

CONCLUSION

The verdict and judgment on Taute's claim for fraud, the second claim, should be reversed and a judgment rendered for defendant Econo-Car International, Inc. thereon. The verdict and judgment for plaintiff Taute on his first claim, the breach of contract claim, should be reduced by the sum of $607.00, the sum allocable to the $5.00 increase in rental payments as of January 1, 1964, and otherwise affirmed.

Respectfully submitted.

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CERTIFICATE OF MAILING

I hereby certify that on the 20th day of May, 1968, I deposited in the Post Office at Billings, Montana, in an envelope securely sealed, with postage thereon prepaid, and addressed to:

John C. Sheehy, Esquire
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true and correct copies of the foregoing Brief of Appellant Econo-Car International, Inc. in Reply to Answering Brief of Appellee Carl M. Taute.

George C. Dahlberg

One of the Attorneys for Defendant and Appellant Econo-Car International, Inc.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

George C. Dalthorp

GEORGE C. DALTHORP
Attorney